Not All Black and White

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Supreme Court set to review the gray areas of Affirmative Action as it relates to constitutionality in the consideration of race and ethnicity in college admissions.

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“It was the best of times, it was the worst of times.” Charles Dickens could have been writing about contemporary American race relations. ¶ The best of times: an African American was twice elected President; two Hispanics and an African American are viable contenders for the Republican presidential nomination; American society is more diverse than ever. ¶ The worst of times: a stream of videos shows white officers slaying black citizens; a Republican presidential candidate seemingly supports registering Muslim Americans; a white supremacist shoots protesters at a Black Lives Matter rally. See GRAY, Page 22A

NOTABLE HIGH COURT DECISIONS PARING THE USE OF RACIAL PREFERENCES AND AFFIRMATIVE ACTION IN HIGHER EDUCATION

1978
Regents of the University of California v. Bakke: The landmark decision upheld affirmative action, allowing race to be one of the factors in college admission policy. However, the court ruled that specific quotas set aside for minority students by the University of California (Davis) School of Medicine were impermissible.

2003
Grutter v. Bollinger: The court ruled University of Michigan’s law school was within its constitutional rights in considering applicants’ race and ethnicity because it did so through a “holistic” review and not by simply awarding points based on race and ethnicity.

2013
Fisher v. University of Texas at Austin: The Supreme Court ruled that lower courts needed to apply “strict scrutiny” and not give colleges deference in reviews of challenges to the constitutionality of race and ethnicity in admissions decisions.
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Against this background, the Supreme Court has chosen to weigh in on that third rail of racial politics: affirmative action. The Court upheld affirmative action only 12 years ago in Grutter v. Bollinger, which concerned an affirmative action program at the University of Michigan Law School. This Wednesday, the Court returns to this divisive issue when it considers Abigail Fisher’s challenge to affirmative action at the University of Texas at Austin (“UT”). Fisher had sought admission to UT’s fall 2008 undergraduate entering class but was rejected.

Why do parties continue to challenge affirmative action if the Supreme Court upheld it in Grutter? It’s simple. Grutter was decided by a slim 5-4 margin with Justice Sandra Day O’Connor writing the majority opinion. O’Connor has since left the Court and was replaced by reliably conservative Samuel Alito. Affirmative action opponents have done the math. They know Grutter hangs by a thread.

Nevertheless, the Court is unlikely to overturn Grutter in the Fisher case. The justices are reluctant to change course so abruptly, and Abigail Fisher is not asking them to do so. Instead, she wants the Court to ratchet up the burden universities must meet before using race in admissions. It’s not sudden death; it’s death by a thousand cuts. Still, why don’t we use this occasion to reflect on the pros and cons of affirmative action? We can begin with some of the shortcomings.

Indeed, it’s hard to deny that affirmative action has some regrettable side effects. Such programs can generate resentment among whites who believe they were denied admission because a less qualified minority applicant took “their” spot. This resentment is genuine even if whites vastly overestimate affirmative action’s impact. (UT, for example, has noted that Abigail Fisher would not have been admitted even if the university had no affirmative action program.)

Affirmative action can also diminish the academic achievements of minority students who are admitted on merit but who others assume were given preferential treatment. As Justice Clarence Thomas lamented, affirmative action programs can “stamp minorities with a badge of inferiority.”

Given these problems, why use affirmative action? Justice O’Connor provided an answer in Grutter when she described affirmative action’s “substantial” educational benefits. These benefits include promoting “cross-racial understanding,” “break[ing] down racial stereotypes,” and enabling students “to better understand persons of different races.” Such benefits might sound nebulous, but O’Connor pointed out that hard-headed American business and military leaders insist that our nation’s competitiveness depends upon graduates who can navigate a diverse world because they have been exposed to “widely different people, cultures, ideas, and viewpoints.”

But is affirmative action working? Looking at American universities today, one might justifiably wonder. Campus after campus is embroiled in conflict over race. The University of Missouri’s president resigned after he failed to address campus hate speech decisively. Yale students want Woodrow Wilson’s name removed from the School of Public and International Affairs because the former President held racist views. And at Harvard Law School, black tape was used to cover the crest of a slave-owning family that appears on the School seal and then later used to deface portraits of African-American professors.

Some might conclude from this turmoil that affirmative action has failed. Maybe our efforts just stirred up animosity? Maybe they fostered a tyrannous political-correctness that insists on purging campus speech of even the slightest “micro-aggressions”? That’s one interpretation. But another is that this tumult is beneficial. Maybe this commotion is the welcome cacophony of students and universities finally wrestling with race in earnest. Sure, it’s messy, and some parties will exaggerate their victimization just as others will minimize real harms. But maybe this commotion is doing precisely what O’Connor predicted: breaking down racial stereotypes, enabling students to better understand persons of different races, and promoting cross-racial understanding.

Since 1933, a larger-than-life bronze statue of Jefferson Davis, the president of the Confederacy, stood on the South Mall of the University of Texas campus. It was only earlier this year, eight decades later, that the University decided to remove the statue. The University plans to reinstall it at what will be the University’s renovated Briscoe Center for American History.

That sounds reasonable. It acknowledges history yet respects the sensibilities of those for whom Jefferson Davis represents bigotry and hatred. Perhaps this small but symbolically important act would have happened even if UT had never admitted a critical mass of African-American students. But, personally, I doubt it.

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